BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA
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Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006.	))))	Rulemaking 06-10-005

APPLICATION OF VERIZON[1] FOR REHEARING OF D.07-10-013

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[1] These comments are submitted on behalf of Verizon California Inc. in its capacity as holder of California Video Franchise Certificate Number 0001 dated March 8, 2007.

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Pursuant to Public Utilities Code Sections 1732 and 1757.1, and Article 16 of the Commission's Rules of Practice and Procedure, Verizon respectfully submits this Application for Rehearing (Application) of D.07-10-013, the Phase II decision in this docket (Decision). The Decision's requirement that state video franchise holders report the number of video subscribers by census tract violates the Digital Infrastructure and Video Competition Act of 2006 (DIVCA) and exceeds the Commission's jurisdiction. For that reason, it must be eliminated.

INTRODUCTION

The Decision's requirement that state video franchise holders such as Verizon must report the number of video subscribers by census tract is not authorized, and indeed is prohibited, by DIVCA. Accordingly, by adopting such a requirement, the Commission is acting outside of its limited jurisdiction under DIVCA.

Although DIVCA requires such detailed reporting of *broadband* subscribership, it does not do so for *video* subscribers, and a provision requiring such reporting was expressly removed from a prior version of the legislation before enactment. Therefore, the Commission cannot lawfully impose such a provision now, nor can it attempt to imply such a requirement in support of its obligation to enforce DIVCA's nondiscrimination provisions. By definition, whether customers subscriber to a service cannot provide information about whether a franchise holder is discriminating. Not only is such a reporting requirement legally erroneous on several independent grounds, but it exposes new video entrants to the additional burden of submitting highly sensitive customer count data that their established market-dominant competitors need not provide. Even if the Commission holds such data confidential, the reporting is an

anti-competitive, unlawful, and burdensome requirement that must be eliminated from the Decision and from General Order 169.

ARGUMENT

A. DIVCA PROHIBITS ANY REQUIRED REPORTING OF VIDEO SUBSCRIBERSHIP BY CENSUS TRACT

The Decision's requirement that franchise holders report the number of video customers by census tract violates DIVCA based on its plain language. In addition, basic principles of statutory interpretation, as well as DIVCA's legislative history, compel the same result.

1. The Plain Language of DIVCA Specifies Detailed Reporting Requirements, Which Do Not Include Video Subscriber Census Tract Detail

DIVCA imposes detailed reporting requirements on video service providers as set forth in Section 5960. Subpart (b) of this section requires state franchise holders to annually report the following information by census tract:

> (1) Broadband information:
> (A) The number of households to which the holder makes broadband ***available*** in this state. …
> (B) The number of households that ***subscribe*** to broadband that the holder makes available in this state.
>
> (2) Video information:
> (A) If the holder is a telephone corporation:
> (i) The number of households in the holder's telephone service area.
> (ii) The number of households in the holder's telephone service that are ***offered*** video service by the holder.
> (B) If the holder is not a telephone corporation:
> (i) The number of households in the holder's video service area.
> (ii) The number of households in the holder's video service area that are ***offered*** video service by the holder.[2]
>
> (3) Low income information

[2] §§ 5960 (b)(1)(A) and (B) and (b)(2)(A) and (B)(emphasis added).

(i) The number of low-income households in the holder's video service area.
(ii) The number of low-income households in the holder's video service area that are ***offered*** video service by the holder.

As these sections makes plain, *both* availability and subscribership data must be reported for broadband service, but *only* availability must be reported for video service.[3] Clearly, had the Legislature intended to require reporting of the number of video *subscribers* on a census tract level, this would have been the place to do so.[4] It did not, and the absence is conclusive – the Legislature did not intend to require census tract level reporting for video subscribership.

DIVCA is equally clear that the Commission may not "impose any requirement on any holder of a state franchise *except as expressly provided* in [DIVCA]."[5] Therefore, the deliberate omission of any such express reporting requirement in DIVCA makes the Commission's action unlawful under Section 5840(a). This obvious result is further bolstered by fundamental principles of statutory interpretation, which likewise compel the interpretation that DIVCA prohibits the omitted report. The principle of e*xpressio unius est exclusio alterius,* the expression of one thing is the exclusion of another, has long guided courts in examining and interpreting statutes. Thus, for example, where agencies are given certain powers by statute, other powers are deemed excluded.[6] And where, as here, items not specifically enumerated by statute are

[3]DIVCA draws a clear distinction between service that is "available" or "offered" for use, as opposed to service that is purchased, in its definition of "access", which is defined as the "*capability* of providing service at the household address . . . *regardless of whether any customer has ordered service.*"
[4] No other section of DIVCA requires reporting of video subscribers at a census tract level.
[5] § 5840(a) (emphasis added).
[6] See *United Farm Workers v. Agricultural Lab. Rel. Bd.,* 41 Cal.App.4th 303, 316, 48 Cal.Rptr.2d 696 (1995) (grant of power to Table Grape Commission to investigate and prosecute civilly

deemed prohibited.[7] Thus, the plain language of DIVCA prohibits imposition of this reporting requirement.

2. Census Tract Reporting of Video Subscribers Was Eliminated From DIVCA Prior to Enactment and Cannot Be Reimposed

Although the plain language of DIVCA plainly demonstrates that the video subscriber reporting requirement is illegal, legislative history provides an independent ground for that conclusion. As explained above, video subscribership reporting at a census tract level is not required by DIVCA. An earlier version of the bill contained such a requirement, but it was removed prior to passage. As amended in the Senate August 23, 2006, the penultimate version of AB2987 required reports including "[t]he number of households *in each census tract* that *use* video service provided by the holder or its affiliates."[8] This plainly called for the number of video subscribers by census tract. However, less than a week later, AB2897 was amended into its final form, as discussed above.[9]

Fundamental principles of California statutory construction dictate that a provision removed from an earlier version of a statute cannot be read into the final one. "The rejection by the Legislature of a specific provision contained in an act as originally introduced is *most persuasive* to the conclusion that the act

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certain violations of Food & Agriculture Code impliedly excluded commission from filing charges with Agriculture Labor Relations Board for violation of other statute).

[7] See *Dean v. Superior Court, 62 Cal.App.4th 638, 641,* 73 Cal.Rptr.2d 70 (1998) (although Elec. Code § 13307 does not specifically prohibit comments, in one candidate's statement for nonpartisan elective office, on another candidate's qualifications, character, or activities, maxim *expressio unius est exclusio alterius* applies to prevent those comments).

[8] See AB2987 as amended in Senate August 23, 2006, p. 15, § 5840(n)(1)(F), available at http://info.sen.ca.gov/pub/05-06/bill/asm/ab_2951-3000/ab_2987_bill_20060823_amended_sen.pdf.

[9] See AB2987 as amended in Senate August 28, 2006, p. 19, (text of § 5840(n)(1)(F) stricken as deleted), and pp.41-42 (§ 5960(b)(1) and (2) added), available at http://info.sen.ca.gov/pub/05-06/bill/asm/ab_2951-3000/ab_2987_bill_20060828_amended_sen.pdf.

should not be construed to include the omitted provision."[10] United States Supreme Court precedent is in accord.[11] Accordingly, this Commission is not free to reimpose video subscriber reporting by census tract.

B. GRAFTING A VIDEO SUBSCRIBER REPORTING REQUIREMENT ONTO THE NONDISCRIMINATION PROVISIONS OF DIVCA IS UNLAWFUL

Ignoring the plain language and legislative history of DIVCA's express reporting provisions in its analysis, the Decision *implies* a video subscriber reporting requirement based on its role in enforcing DIVCA's nondiscrimination provisions. Although the Commission has previously found that it has the authority to impose additional reporting requirements when "truly necessary" to support its enforcement obligations under DIVCA,[12] it may not use such authority to override express prohibitions found elsewhere in DIVCA. Doing so would violate the Commission's fundamental duty to interpret the different parts of DIVCA in harmony with each other. Even if the plain language of DIVCA did not prohibit video subscriber reporting, the Decision's reasoning in support of an implied reporting obligation is illogical, erroneous, and fails the most basic scrutiny.

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[10] *Rich v. State Board of Optometry,* 235 Cal. App. 2d 591, 607, 45 Cal. Rptr. 512 (1965) (emphasis added). See also 7 Witkin Summ. Cal. Law, Const. Law § 125 (omissions from bills), citing *Beverly v. Anderson,* 76 C.A.4th 480, 485, 90 C.R.2d 545 (1999) (fact that Legislature omitted provision from final version of statute is strong evidence that it did not intend provision to be judicially grafted onto statute); *see also California Mfrs. Assn. v. Public Utilities Com.*, 24 Cal. 3d 836, 845-846, 157 Cal. Rptr. 676, 598 P.2d 836 (1979) (accord).

[11] *See, e.g., Daily Income Fund v. Fox*, 464 U.S. 523, 539 (1984); *Doe v. Chao*, 540 U.S. 614, 623 (2004). *See also* discussion in Verizon's Opening Comments on Proposed Decision of Commissioner Chong, filed February 5, 2007 at 6-7.

[12] See D.07-03-014 (Phase I decision) at 152 (additional reports should be required "sparingly" and only if "truly necessary"), 209 (additional regulations may be imposed if deemed "necessary"), cited in Decision at 42, footnote 48.

1. The Commission Cannot Imply a Subscriber Reporting Requirement When Other Portions of DIVCA Prohibit It

As demonstrated above, the reporting provisions of DIVCA expressly prohibit any census travel level reporting obligation regarding video service subscribers. Although it might seem self-evident, the Commission cannot simply impose a new reporting requirement it finds appropriate or necessary to serve its enforcement obligations under DIVCA when other sections of DIVCA as lawfully interpreted *expressly prohibit* such reporting. Doing so would violate the Commission's fundamental obligations in interpreting DIVCA to (1) give significance, if possible, to every word or part, and (2) to harmonize the parts by considering a particular clause or section in the context of the whole.[13]

2. Discrimination Has Nothing To Do With Subscribership, And So the Commission's Nondiscrimination Enforcement Obligation Cannot Support a Subscribership Data Requirement

The Decision claims, without explanation, that video subscriber data will "help [the Commission] ensure compliance with the non-discrimination provision of Section 5890(a),"[14] and will be "necessary information" to allow the Commission to "determine whether to initiate action on its own motion to enforce Section 5890(a)."[15] Close examination shows these assertions to be wrong and in violation of DIVCA.[16]

Previous commenters, including Verizon, had argued that DIVCA's nondiscrimination and build obligations are defined by whether a customer has *access* to video service, not whether the customer *actually subscribes* to that

[13] See 7 Witkin Summ. Cal. Law, Const. Law § 115(1)(c) (general rules of interpretation).
[14] Decision at 41.
[15] Decision at 24; see also Finding of Fact 4.
[16] Indeed, on their face such assertions are puzzling. New market entrants such as Verizon are investing millions of dollars to enter the video service market and have every incentive to gain as much market share as possible.

service.[17] Therefore, they argued, video subscribership is irrelevant to section 5890's nondiscrimination obligations. The Decision, however, ignored those arguments, reasoning that Section 5890 prohibits *both* discrimination *and* denial of access, and that video subscribership would aid it in determining whether discrimination was occurring.[18] This reasoning is faulty, however, because the other parts of Section 5890 make clear that *discrimination is in fact the same as denial of access*.

> Section 5890(a) provides that a franchise holder
>
> "may not discriminate against or deny access to service to any group of potential residential subscribers because of the income of the residents in the local area in which the group resides."[19]

"Access" is defined as the "*capability* of providing service at the household address . . . *regardless of whether any customer has ordered service*. . . ."[20] The other parts of Section 5890 define what is needed to satisfy Section 5890(a)'s nondiscrimination obligations, and those all make clear that *discrimination is defined by access*. Thus, for example:

- Section 5890(b) provides that large telcos satisfy Section 5890(a) if they provide specified levels of "access" to video service, plus free service to community centers as required
- Section 5890(c) provides that small telcos satisfy Section 5890(a) if they "offer" video service within their entire area within a reasonable period of time
- Section 5890(d) provides that non-telcos, or telcos serving out of their telephone serving areas, are subject to a "rebuttable presumption that discrimination in providing service has not occurred within those areas,"

[17] See comments of Verizon on Proposed Decision of Commissioner Chong Resolving Issues in Phase II, filed September 13, 2007, at 3; Opening Comments of AT&T on Draft Opinion Resolving Issues in Phase II, filed September 13, 2007, at 4-5.
[18] Decision at 40-41.
[19] § 5890(a)(emphasis added).
[20] § 5890(j)(4)(emphasis added).

> although the Commission may review such holder's service territory to insure that it is not drawn in a discriminatory manner.

In short, DIVCA makes clear that its nondiscrimination provisions are satisfied *solely* by the provision of "access" to service. Since customer subscription has nothing to do with "access," census tract video subscriber data has nothing to do with discrimination, contrary to the Decision's claim that it is "necessary" to ensure compliance with nondiscrimination obligations. Census tract subscriber data cannot shed any light on whether a carrier has engaged in discrimination, and therefore cannot be "necessary" information for the Commission's enforcement of DIVCA's nondiscrimination obligations. Indeed, such a finding violates Section 5890(b), (c) and (d), all of which provide that Section 5890 can be satisfied by considerations completely independent of customers' decisions to subscribe to service.

Even if nondiscrimination meant something different than access (which it does not), the Decision fails to explain how video subscriber data could possibly aid in determining whether a carrier is discriminating in providing access. After all, it is the customer who chooses to subscribe to service, not the franchise holder. So long as the franchise holder provides nondiscriminatory *access* to service, it cannot be engaging in discrimination as prohibited by DIVCA. Indeed, the Decision's reliance on the comments of DRA and Greenlining as to the potential uses of this information[21] makes clear that the *only* potential value of this information is to explore the extent to which customers are actually "using"

[21] Decision at 42, footnote 49 (citing DRA and Greenlining comments "discussing the usefulness of subscribership information by census tract as a measure of actual progress in closing the 'digital divide'.").

services to which they have access, *not* to assess discrimination as defined by DIVCA.[22] Greenlining makes this clear:

> In order for the Commission to ensure that these services are truly accessible to all communities, in an economic and technical sense, it *must* know whether households in specific areas or at certain income levels are *actually utilizing* available services.[23]

But the Commission is already obtaining broadband access *and* subscribership data under DIVCA, and that will give it all the information it needs to assess the "digital divide." And even if customer subscription to video as opposed to broadband service could possibly shed information on the efforts to "increase investment in broadband infrastructure and close the digital divide,"[24] a connection that defies reason, the Commission may not circumvent DIVCA's express prohibition described above to obtain such data.

CONCLUSION

Verizon appreciates the Commission's diligent and expeditious implementation of its franchising role under DIVCA and believes that, in virtually all respects, it has done so in a manner true to the letter and spirit of DIVCA. In the area of reporting, however, the Commission has clearly overstepped legal bounds in its zeal to obtain data it thinks will be useful. But reporting video subscribership by census tract will not be useful *in any way* under DIVCA. Moreover, requiring unnecessary and sensitive data only from new market

[22] DRA states that the data will allow the Commission to address "any video access gaps and low usage rates." DRA Reply Comments, September 18, 2007, at 3. Obviously "access gaps" will be fully revealed by the video access data holders must provide under §5960(b)(2)(A)(ii) and (b)(ii) and (b)(3)(ii), not by subscriber data.

[23] Greenlining Amended Reply Comments, filed September 24, 2007, at (unnumbered page) 5 (emphasis in original and added). (Certain portions of Greenlining's amended reply comments were excluded from the record of this proceeding by ALJ Kotz's email ruling dated September 24, 2007 because they exceeded permitted page limits, but the quoted portion of Greenlining's comments is within the portion of its comments admitted into the record.)

[24] Decision at 19.

entrants – leaving incumbents free of comparable obligations – not only provides incomplete and inaccurate data, but more importantly imposes disparate regulatory burdens in a highly competitive market, something the Commission has been loathe to do.[25] Merely keeping such competitively sensitive data confidential does not address the concerns raised here. Every such reporting requirement imposes additional cost, and such costs are completely unwarranted in a competitive market such as video service.

As demonstrated above, a census tract reporting requirement for video subscriber data clearly violates the plain language of DIVCA and exceeds the Commission's authority, and therefore should be removed from the Decision and from General Order 169.

Dated: November 5, 2007

Respectfully submitted,

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[25] Cf. URF Decision, D.06-08-030 at 218 (recommending cost-benefit analysis for monitoring requirements), id. at 234 (certain monitoring not required in competitive environment).

APPENDIX A

Proposed Modifications to Findings of Fact and Conclusions of Law

Findings of Fact

~~4. Reporting by a state video franchise holder of the number of its video customers by census tract, in addition to the number of households that are offered video service, will provide necessary information to the Commission in enforcing the non-discrimination requirements of Pub. Util. Code Section 5890(a).~~

Conclusions of Law

7. The Commission has authority to take actions necessary to carry out its duties under DIVCA. No additional reporting requirements are needed at this time.~~, and to that end the Commission may impose additional reporting requirements beyond those set forth in DIVCA.~~

CERTIFICATE OF SERVICE

I hereby certify that: I am over the age of eighteen years and not a party to the within entitled action; my business address is 711 Van Ness Avenue, San Francisco, CA 94102; I have this day served a copy of the foregoing:

APPLICATION OF VERIZON FOR REHEARING OF D.07-10-013

by electronic mail to those parties on the service list shown below who have supplied an e-mail address, and by U.S. mail to all other parties on the service list.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 5th day of November, 2007, at San Francisco, California.

/s/Thomas Bird
THOMAS BIRD

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Rulemaking 06-10-005

CALIFORNIA PUBLIC UTILITIES COMMISSION
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